Petition

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NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

VICTOR GREGER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals correctly ruled that they did not have jurisdiction to consider an appeal filed after a District Court Judge has ordered a defendant's attorney removed after finding a conflict of interest.

2. Whether the Court of Appeals correctly ruled that assuming that the Court did not have jurisdiction under Title 28 U.S.C. §1291 that the Court should also not consider the case as a Petition for Writ of Mandamus under Title 28 U.S.C. §1651.

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The Petitioner, VICTOR GREGER, respectfully prays that a Writ of Certiorari issue to review the Order of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on or about October 1, 1981 and the Order of November 19, 1981 denying the Petition for Rehearing and rejecting the Suggestion for a Rehearing en banc.

OPINION BELOW

The Order of the United States Court of Appeals for the Ninth Circuit was filed on or about October 1, 1981 in a reported opinion. A copy of the Opinion is attached hereto as

Appendix A. On or about November 19, 1981, the United States Court of Appeals for the Ninth Circuit additionally denied the Petitioner's Motion for Rehearing and rejected Petitioner's Suggestion for a Rehearing en banc. A copy of said Order of November 19, 1981 is attached hereto as Appendix B.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Title 28 U.S.C. §1291 and Title 28 U.S.C. §1651.

STATEMENT OF THE CASE

On September 16, 1980, an eight-count indictment was returned against VICTOR GREGER charging him with violations of Title 18 U.S.C. §1951 and Title 26 U.S.C. §7206(1) and §7602(2). Following initial Court appearances, the Government filed a written motion requesting that the Court Below disqualify OSCAR B. GOODMAN, ESQ. and his firm from representing Mr. GREGER. A hearing was held on November 21, 1980 and following the hearing, the Court Below issued a written order granting the Government's Motion and disqualifying Mr. GOODMAN from further representation of Mr. GREGER. A Notice of Appeal was later filed and eventually oral arguments were

held before the Ninth Circuit Court of Appeals. In the opening briefs of both Appellee and Appellant, jurisdiction had been presumed but the Ninth Circuit Court of Appeals at the time of oral arguments and thereafter directed both the United States and counsel for Mr. GREGER to file additional briefs on the issue of whether or not the disqualification of a defense attorney was an appealable order. Ultimately on October 1, 1981, the Appellate Court ruled that the pre-trial order in a criminal case disqualifying a defense attorney was not a "final decision" within the Collateral Order Doctrine and therefore, such order was not appealable. The Court further ruled that they would not consider the instant case as coming under the Writ of Mandamus Statute.

Mr. GREGER, through his counsel, thereafter filed a Motion for Rehearing and a Suggestion for a Rehearing *en banc* which was denied pursuant to Order of November 19, 1981. The instant Petition for a Writ of Certiorari follows.

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REASONS FOR GRANTING THE WRIT

I.

THE COURT BELOW ERRED IN DETRMINING THAT THEY DID NOT HAVE JURISDICTION TO CONSIDER AN APPEAL FILED AFTER A DISTRICT COURT JUDGE HAD ORDERED A DEFENDANT'S ATTORNEY REMOVED AFTER FINDING A CONFLICT OF INTEREST.

In light of the Ninth Circuit Court of Appeals Opinion in *United States v. Greger,* a conflict now exists between the Circuits as to the question of whether or not a Court of Appeals has jurisdiction to consider an appeal filed after a District Court Judge has ordered a defendant's attorney removed after finding a conflict of interest. Title 28 U.S.C. §1291 pertains to jurisdictions of Court of Appeals and provides that a Court of Appeals has jurisdiction over all "final decisions" of District Courts. In *United States v. Dolan,* 570 F.2d 1177 (3rd Cir.. 1978), the Court found that they had jurisdiction to consider an order denying a motion to disqualify an attorney citing other cases therein. In reaching its decision, the Court found that although not a final judgment in the traditional sense, attorney disqualification orders are "a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it." The Court in *Dolan, supra.* also recognized several situations where this rule has been applied in criminal cases and emanates from *Cohen v. Beneficial Industrial Loan Corporation,* 337 U.S. 541, 547, 69 S.Ct. 1221, 93 L.Ed.2d 1528 (1949). In *Cohen, supra.,* the United States Supreme Court ordered review of a matter which had been argued as being not a "final decision". In doing so, the Court set forth certain language as guidance as to issues which are and are not appealable under Title 28 U.S.C. §1291:

. . .

> "When that time comes, it will be too late effectively to review the present order and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably. We conclude that the matters embraced in the decision appealed from are not of such an interlocutory nature as to effect, or to be effected by, decision of the merits of this case.

> This decision appears to fall in that small class which finally determines claims of right separable from, and collateral to rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. The Court has long given this provision of the statute this practical rather than a technical construction. . .
>
> We hold this order appealable because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it. . .".

It is submitted that the language in *Cohen, supra.* is equally applicable to the case-at-bar. The District Court has now ordered an attorney removed from the case because of a conflict of interest. The Defendant, therefore, is faced with going to trial without counsel of his choice. On appeal, upon his conviction (assuming such occurred), will he then be forced to argue that counsel at the time of trial was not as competent as the counsel ordered removed by the District Court? Like the language in *Cohen, supra.*, it is suggested that the instant issue is not one which can be deferred until the whole case is adjudicated and further that the issue presented herein is too important to be denied review.

In *Abney v. United States,* 421 U.S. 651, 52 L.Ed.2d 651, 97 S.Ct. 2034 (1977), the Court held that jurisdiction existed for the Court to review an issue of double jeopardy after a District Court's denial of a motion to dismiss on double jeopardy grounds but prior to the time of a second trial and its rationale the Court again relying in part upon its rationale in *Cohen, supra.* found that jurisdiction was present permitting Appellate review of decisions which finally determine claims of right separable from and collateral to rights asserted in the actions that are too immportant to be denied review and too independent of the cause itself to require that appellate jurisdiction be deferred until the whole case is adjudicated.

In *Coopers and Lybrand v. Livesay,* 437 U.S. 463, 57 L.Ed.2d, 351, 98 S.Ct. 2454, the United States Supreme Court found that jurisdiction was lacking for the Court to review a question of certifying or decertifying a class in a class action lawsuit. As a basis, however, for finding a lack of jurisdiction, the Court relied in part upon Rule 23(c)(1) of the Federal Rules of Civil Procedure providing that an order involving a class status may be "altered or amended before a decision on the merits and finding further therefore that a Federal District Court order denying or granting class status is inherently tentative and could be amended at anytime". Unlike *Coopers, supra.,* the instant case does not present this Honorable Court with an order which can be amended at anytime. Surely the District Court is not going to reverse its decision either immediately before or during the course of the trial against the Defendant GREGER herein nor will the Court change its order after a verdict of guilty has been entered against Mr. GREGER. Simply stated, unlike the *Coopers* case, *supra.*, where the Court had the power at anytime to amend its order pertaining to the question of a class action, in the instant case, the question of the disqualification of Mr. GREGER'S attorney will not arise again unless such matter is again presented to this Honorable Court after a conviction against Mr. GREGER with Mr. GREGER either being represented by himself or trial counsel other than trial counsel of his own choosing.

In *Firestone Tire & Rubber Company v. Risjord,* ____ U.S. ____, 66 L.Ed.2d 571 (January 13, 1981), the Court again considered the question of the applicability of Title 28 U.S.C. §1291 and relied in part upon the rationale of *Coopers, supra.* that the issue presented in *Firestone, supra.,* was not appealable since the District Court judge could, at anytime, amend the previously entered order. In

Firestone, supra., the Respondent was the lead attorney for a group of plaintiffs in certain product liability suits against the petitioner. The petitioner moved to disqualify the respondent because of an alleged conflict of interest. The District Court ultimately denied the motion to recuse the respondent as an attorney in the case and the petitioner filed a notice of appeal pursuant to 28 U.S.C. §1291. What the Court held was in finding a lack of jurisdiction that orders denying a motion to *disqualify* the opposing party's counsel in a *civil case* are not appealable final decisions under §1291 because such order does not fall within the "collateral order" exception of *Cohen, supra.* The Court went on to hold that the petitioner in *Firestone, supra.* made no showing as required under the *Cohen* Doctrine of immediatel appealable "collateral orders" that an order denying disqualification is effectively unreviewable on appeal from a final judgment on the merits. The Supreme Court in *Firestone, supra.* also went on to find that appellate jurisdiction did not lie because like *Coopers, supra.*, the District Court judge could change his opinion at any point during the litigation or even after the trial. The Court in *Firestone* also set forth the tests relied upon in *Coopers, supra.* as being:

> "The order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action and be effectively unreviewable on appeal from a final judgment."

It is submitted that in applying the *Coopers, supra.* rationale as redefined in *Firestone, supra.*, the District Court in the case-at-bar has made a conclusive determination on a disputed question. Unlike *Firestone, supra.* and unlike *Coopers, supra.* itself, the District Court will not again be presented with the question of whether or not it

erroneously eliminated Mr. GOODMAN from representing Mr. GREGER. Thus, the second criteria of *Coopers, supra.* is met, being that the District Court orders resolved an important issue completely separate from the merits of the action. The issue which was resolved by the District Court was whether or not Mr. GOODMAN could represent Mr. GREGER and this is independent of the merits of the criminal charges pending against Mr. GREGER. The third criteria of *Coopers, supra.* is also met in that the question of disqualification of Mr. GOODMAN is effectively unreviewable on appeal from a final judgment. Mr. GOODMAN will obviously not be trial counsel of record. Collateral issues will also be raised assuming a finding of guilt against Mr. GREGER as to "trial tactics" decisions made by his newly assigned attorney and attempting to compare those with the actions that would have been taken by Mr. GOODMAN. The main area of concentration which an Appellate Court will review as to a challenge of Mr. GREGER'S new attorney will not be whether or not Mr. GREGER was allowed to have the attorney of his choice but whether or not the attorney forced upon him exercised that degree of skill to simply provide him with the effective assistance of counsel even though that degree of skill might be adequate under case standards but inadequate under competency comparison standards.

The case of *Silver Chrysler-Plymouth, Inc., supra.* presents an excellent analysis of the issue of the appealability of motions to disqualify attorneys. After reviewing numerous District Court and Appellate Court cases from other jurisdictions, the Second Circuit also taking into consideration the *Cohen, supra.* criteria found that such orders were appealable. In reaching this question, the Second Circuit specifically overruled two prior decisions of

that Circuit and also addressed itself to the question of whether or not they could consider the issue as an extraordinary writ under Title 28 U.S.C. §1651. What the Court ultimately did was find that the issue was important enough for immediate appeal although the Court was not overly concerned with the method utilized for reaching the Appellate Court. The Court ultimately found:

> "By holding such an order directly appealable, we eliminate the uncertainties (and the paperwork) attendant to resorting to §1292(b) and/or §1651, since the ultimate objective is to bring before an Appellate Court an important question which if unresolved might well taint a trial. Why should not the question be presented before judicial and attorney time may have been needlessly expended?"

In *United States v. Garcia,* 517 F.2d 272 (5th Cir., 1975), that Court weighed and considered the question of the appealability of an order disqualifying a defense attorney prior to trial. In its consideration, the Court reviewed the fact that the instant issue would not be presented in a great majority of cases. In *Garcia, supra.,* the Government, as in the case-at-bar, had filed motions for the determination of conflicts of interest as to three defense attorneys. The District Court disqualified the three attorneys and appeals were taken and the Court of Appeals ultimately held that the Court's Order of Disqualification was appealable. In finding that the issue was immediately appealable, the Court relied upon *Cohen, supra.* and found that the disqualification order, although not a "final judgment" in the traditional sense, involved a claim "separable from and collateral to rights asserted in the action, too important to be denied review and too independent of the cause itself to require that Appellate consideration be deferred until the whole case is adjudicated. In key phraseology used by the Court, the Court

held: "In this case, deferral of review until after completion of the trial would dissipate judicial resources and possibly jeopardize the defendant's case by prohibiting representations at trial by counsel of their choice".

It is submitted that a majority of the Courts which have been presented with the instant question have and would find that an order of disqualification would be immediately appealable. In *United States v. Deutsch,* 599 F.2d 46 (5th Cir., 1979), the Appellate Court found jurisdiction where a District Court had recused an attorney. In the case of *In re Investigations Before April, 1975 Grand Jury,* 531 F.2d 600 (Court of Appeals, District of Columbia, 1976), the Appellate Court at footnote 8 at page 605 set forth what appears to be the majority opinion allowing jurisdiction. Numerous cases are cited within that footnote standing for the proposition that a motion to disqualify counsel is a final judgment under the collateral order doctrine of *Cohen, supra.* In *In re Investigations, supra.,* the Court even held that it applied to a grand jury proceeding.

As a result of the above and particularly in light of the fact that that a conflict currently exists between the Circuits, it is submitted that the Court of Appeals for the Ninth Circuit was in error in finding that the instant issue was non-appealable.

II.

THE COURT BELOW ERRED IN DETERMININNG THAT THEY COULD NOT CONSIDER THE INSTANT CASE AS A PETITION FOR WRIT OF MANDAMUS UNDER TITLE 28 U.S.C. §1651.

Title 28 U.S.C. §1651 provides that all Courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdiction and agreeable to the usages and principles of law. The question, therefore, arises as to assuming arguendo that this Honorable Court does not have jurisdiction under Title 28 U.S.C. §1291, can the Court entertain jurisdiction under §1651 of Title 28 U.S.C., when the issue presented is the disqualification of an attorney at the District Court level due to an alleged conflict of interest.

In *Cord v. Smith,* 338 F.2d 516 (9th Cir., 1964), the Court considered whether or not a writ of mandamus would apply to an issue. That case involved an action to recover money where a District Court had denied a defendant's motion to disqualify a plaintiff's attorney from acting as the plaintiff's attorney in the case. The defendant ultimately appealed and the Court in construing Title 28 U.S.C. §1292 found that the order was not appealable. This Honorable Court is asked to note that specifically §1292 was the statute which was considered in *Cord, supra.* and the Court in finding that it was not appealable reflects this in its opinion by stating "it is true that the motion made in the Trial Court requests an order which appears on its face to be in the nature of an injunction and the order of denial might be considered appealable under 28 U.S.C. §1292(a)." The discussion continues "the personal relief sought, however, is a ruling that Young is disqualified." The Ninth Circuit then went on to cite two leading cases, being *Fleischer v. Phillips,* 264 F.2d 515 (2nd Cir., 1959) and *Marco v. Dulles,* 268 F.2d 192 (2nd Cir., 1959) which held, in effect, that an order denying a similar motion was not appealable. This Honorable Court is asked to take notice that both *Fleischer, supra.* and *Marco, supra.* Second Circuit cases, were specifically

overruled by the Second Circuit in *Silver Chrysler-Plymouth, Inc., supra.* (see prior discussion under the issue of whether or not this Honorable Court has jurisdiction under Title 28 U.S.C. §1291.) The Ninth Circuit, therefore, in *Cord, supra.* relied upon *Fleischer, supra.* and *Marco, supra.* in finding that there was not a direct appeal allowed. Separate and aside, however, from this, the Ninth Circuit in *Cord, supra.* continued its analysis by addressing itself to whether or not the Appellate Court could treat the matter as a petition for a writ. The Court ultimately held that "we think that we should exercise our discretion to so treat the matter in this case" (as a writ.) In reaching its conclusion, the Court held "we have held that where a party attempts to appeal from an unappealable order and the circumstances justify our doing so, we can in our discretion treat the proceeding as a petition under the All-Writs Act. 28 U.S.C. §1651." Thereafter, the Court considered the merits of the case. It is therefore submitted that *Cord, supra.* stands for the proposition that the issue presented in the instant case is one which can be considered by this Honorable Court under the All-Writs Provision of Title 28 U.S.C. §1651.

The Court's attention is drawn to the case of *Silver Chrysler-Plymouth, Inc., supra.*, a case often cited within the instant brief. The Court's attention is particularly drawn to the fact that not only was the question raised therein whether or not the issue of attorney disqualification was immediately appealable but also whether or not a writ of mandamus would lie. Specifically, in that case, a notice of appeal had been filed from the order pertaining to the disqualification of the attorney and in conjunction with the notices of appeal, a petition for extraordinary writ was also filed under Title 28 U.S.C. §1651. The Appellate Court ultimately joined the petition for writ with the motion to

dismiss the appeal which had raised the jurisdiction question. While the Court ultimately held that "by holding such an order directly appealable, we eliminate the uncertainties (and the paperwork) attendant to resorting to §1292(b) and/or §1651." The Court did not eliminate the possibility that a writ of mandamus was the proper procedure to be utilized, assuming arguendo, that the direct appeal had been an improper method for the Court continued in their opinion that "in view of our decision denying the motion to dismiss the appeal, the petition for a writ becomes moot and is therefore dismissed." The Court drew the readers attention to the Sixth Circuit case of *Melamed v. ITT Continental Baking Company,* 592 F.2d 290 (6th Cir., 1979) where the Sixth Circuit over-ruled an earlier decision and held that an order *denying* a motion for disqualification of counsel would not longer be applicable under the Collateral Order Doctrine.

For the above indicated reasons, it is respectfully submitted that the Court Below was in error in not viewing the instant case as one subject to review as a Writ of Mandamus.

CONCLUSION

For the above indicated reasons, it is respectfully submitted that this Honorable Court grant certiorari in the instant case.

Respectfully Submitted:

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CERTIFICATE OF SERVICE

It is hereby certified that true and correct copies of the above and foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit was mailed this _____ day of January, 1982, postage prepaid, to the Honorable WADE H. McCREE, Solicitor General, United States Department of Justice, Washington, D.C. 20530.

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

Victor GREGER,
Defendant-Appellant.

No. 80-1818

United States Court of Appeals, Ninth Circuit

Argued March 12, 1981.
Submitted, Sept. 15, 1981.
Decided Oct. 1, 1981.

Defendant appealed a postindictment pretrial order of United States District Court for the District of Nevada, Edward C. Reed, Jr., J., which disqualified his counsel. The Court of Appeals, Duniway, Circuit Judge, held that: (1) pretrial order in criminal case disqualified from counsel was not a "final decision" within collateral order doctrine and therefore such order was not appealable, and (2) pretrial order disqualifying defense counsel, which was entered after hearing at which defendant waived to refuse his right to conflict-free representation and in which defense counsel stated that he would not ask his other clients and former clients to waive their attorney-client privilege, did not qualify for extraordinary relief of a writ of mandamus.

Appeal dismissed.

Appeal from the United States District Court for the District of Nevada.

Before DUNIWAY and NORRIS, Circuit Judges, and HANSON,* District Judge.

DUNIWAY, Circuit Judge:

Greger appeals from a post-indictment, pre-trial order disqualifying his counsel. The order was entered after a hearing at which Greger refused to waive his Sixth Amendment right to conflict-free representation and at which Greger's counsel stated that he would not ask his other clients and former clients—potential witnesses against Greger—to waive their attorney-client privileges. Because we conclude that the district court's order is not appealable under 28 U.S.C. §1291 and because the case does not present exceptional circumstances warranting issuance of a writ of mandamus, we dismiss the appeal without deciding the merits of the disqualification order.

I. Jurisdiction under 28 U.S.C. §1291.

[1] In *Cohen v. Beneficial Industrial Loan Corp.*, 1949, 337 U.S. 541, 69 S.Ct. 1221, 93 L.ED. 1528, the Supreme Court held that a "small class" (*Id.* at 546, 69 S.Ct. at 1225) or orders are final and appealable under §1291, even though they do not end the litigation. The Court has defined the attributes of such orders as follows: "[T]he order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final

*The Honorable William C. Hanson, Senior United States District Judge for the Northern District of Iowa, sitting by designation.

judgment." *Coopers & Lybrand v. Livesay*, 1978, 437 U.S. 463, 468, 98 S.Ct. 2454, 2457, 57 L.ED.2d 351. The Court has included within this small class, *inter alia*, an order denying a defendant's claim that his impending trial puts him twice in jeopardy, *Abney v. United States*, 1977, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651, and an order denying a motion to reduce bail, *Stack v. Boyle*, 1951, 342 U.S. 1, 72 S.Ct. 1, 96 L.Ed. 3. On the other hand, a pre-trial discovery order has been excluded form the *Cohen* category, *United States v. Ryan*, 1971, 402 U.S. 530, 91 S.Ct. 1580, 29 L.Ed.2d 85, as has a pre-trial order denying a defendant's motion to dismiss an indictment because of an alleged violation of his right to a speedy trial. *United States v. MacDonald*, 1978, 435 U.S. 850, 98 S.Ct. 1547, 56 L.Ed.2d 18. For further discussion of *Cohen* and the collateral order rule, see *Firestone Tire & Rubber Co. v. Risjord*, 1981, ____ U.S. ____, 101 S.Ct. 669, 66 L.Ed.2d 571; *United States v. Garner*, 9 Cir., 1980, 632 F.2d 758, 761–66.

The question we confront here is whether a pre-trial order in a criminal case disqualifying defense counsel is a "final decision" within the collateral order doctrine of *Cohen*, *supra*, and therefore appealable under 28 U.S.C. §1291. There is considerable case law on the appealability of pre-trial orders *denying* motions to disqualify counsel, but there is comparatively little on the same question where the order is granted.

In *Cord v. Smith*, 9 Cir., 1964, 338 F.2d 516, 521, clarified, 1966, 370 F.2d 418, we held, in the context of a civil suit, that an order denying a motion to disqualify counsel was not an appealable order. We approved the position then taken by the Second Circuit in *Fleischer v. Phillips*, 2 Cir., 1959, 264 F.2d 515, that an order denying a motion to

disqualify did not fall within the "small class" of collateral orders made appealable by *Cohen*. However, we held further that "where a party attempts to appeal from an unappealable order, and the circumstances justify our doing so, we can, in our discretion, treat the proceedings as a petition under the All Writs Act, 28 U.S.C. §1651." *Id.* at 521. Following *Cord*, in civil proceedings, we have treated appeals from orders denying motions to disqualify counsel as petitions for writ of mandamus in some cases. *See Unified Sewerage Agency v. Jelco Inc.*, 9 Cir., 1981, 646 F.2d 1339, 1343–1344; *Trone v. Smith*, 9 Cir., 1980, 621 F.2d 994, 996 & n.1; *Chugach Electric Ass'n. v. U.S.D.C. for the District of Alaska*, 9 Cir., 1966, 370 F.2d 441, 442. *See also United States v. State of Washington*, 9 Cir., 1978, 573 F.2d 1121.

The appealability of pre-trial orders denying motions to disqualify has had a far more checkered history in other circuits. The Second Circuit, for example, in *Harmar Drive-In Theatre, Inc. v. Warner Bros. Pictures*, 2 Cir., 1956, 239 F.2d 555, concluded that both an order denying and an order granting a motion to disqualify are appealable under *Cohen*. It then reversed itself, at least as to an order denying a disqualification motion, in *Fleischer v. Phillips*, *supra*, only to return to *Harmar* in *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 2 Cir., 1974, in banc, 496 F.2d 800.

In part because of the influence of *Silver Chrysler*, a majority of the circuits came to hold that an order denying a disqualification motion is appealable. *See, e.g., Akerly v. Red Barn System, Inc.*, 3 Cir., 1977, 551 F.2d 539; *Aetna Casualty and Surety Company v. United States*, 4 Cir., 1978, 570 F.2d 1197; *Woods v. Covington County Bank*, 5 Cir., 1976, 537 F.2d 804; *Melamed v. ITT Continental Banking Co.*, 6 Cir., 1976, 534 F.2d 82; *Fred Weber, Inc. v. Shell Oil*, 8 Cir., 1977, 566 F.2d 602; *Fullmer v. Harper*, 10

Cir., 1975, 517 F.2d 20. *See also Schloetter v. Railoc of Indiana, Inc.*, 7 Cir., 1976, 546 F.2d 706 (order granting motion to disqualify); 9 Moore's Federal Practice ¶ 110.13[10].

But this was by no means the end of the story. The District of Columbia Circuit rejected the *Silver Chrysler* rule, in the case of an order denying a motion to disqualify, *Community Broadcasting of Boston, Inc. v. FCC*, D.C. Cir., 1976, 546 F.2d 1022, 1026–1027. And as the other courts of appeal that followed *Silver Chrysler* came to experience its effects, they too began a reevaluation. In *Armstrong v. McAlpin*, 2 Cir., 1980, 625 F.2d 433, 437–440, the Second Circuit itself abandoned *Silver Chrysler*. The Sixth Circuit, in *Melamed v. ITT Continental Baking Co.*, 1979, 592 F.2d 290, 294–296, and the Eighth Circuit, in *In re Multi-Piece Rim Products Liability Litigation*, 8 Cir., 1980, in banc, 612 F.2d 377, vacated sub nom, *Firestone Tire and Rubber Co. v. Risjord, supra*, have both abandoned the *Silver Chrysler* rule, in cases of orders denying motions to disqualify. *See also In re Fine Paper Antitrust Litigation*, 3 Cir., 1980, 617 F.2d 22; *In re Continental Investment Corp.*, 1 Cir., 1980, 637 F.2d 1, 4–8.

The Supreme Court finally laid to rest the question of the appealability of an order denying disqualification, at least in the context of civil suits, in *Firestone Tire & Rubber Co. v. Risjord, supra*. Emphasizing the narrowness of the *Cohen* exception and the policies served by § 1291's insistence that appeals await final judgment, the Court held that orders denying motions to disqualify counsel are not appealable orders. The Court reasoned that such orders failed that part of the *Cohen* test which requires that the order "be effectively unreviewable on appeal from a final judgment":

> The properiety [sic] of the District Court's denial of a disqualification motion will often be difficult to assess until its impact on the underlying litigation may be evaluated, which is normally only after final judgment. The decision whether to disqualify an attorney ordinarily turns on the peculiar factual situation of the case then at hand, and the order embodying such a decision will rarely, if ever, represent a final rejection of a claim of fundamental right that cannot effectively be reviewed following judgment on the merits . . . [S]hould the Court of Appeals conclude after the trial has ended that permitting continuing representation was prejudicial error, it would retain its usual authority to vacate the judgment appealed from and order a new trial. That remedy seems plainly adequate. . . .
> (____ U.S. at ____, 101 S.Ct. at 675).

The Court noted that in certain circumstances a party might attempt to have the order denying disqualification certified for interlocutory appeal under 28 U.S.C. § 1292(b) and that, in "exceptional circumstances," a writ of mandamus might be available from the court of appeals. The Court explicitly reserved the question whether an order *granting* disqualification would be appealable and whether an order denying a disqualification motion in a criminal case might be appealable.

We believe that the Court's reasoning in *Firestone* is equally applicable to the case at bar, and that Greger's "plainly adequate" remedy is to obtain review of this order, and other claims of error, should he so desire, at the conclusion of the trial, if he is convicted. The fact that *Firestone* was a civil action while this is a criminal proceeding does not, we think, distinguish the two cases. Indeed, if anything the *Cohen* rule is more sparingly applied in the criminal context. As the Court has repeatedly stated "[a]dherence to [the] rule of finality has been particularly

stringent in criminal prosecutions because 'the delays and disruptions attendant upon intermediate appeal,' which the rule is designed to avoid, 'are especially inimical to the effective and fair administration of the criminal law.' " *Abney v. United States, supra*, 431 U.S. at 657, 97 S.Ct. at 2039, quoting *DiBella v. United States*, 1962, 369 U.S. 121, 126, 82 S.Ct. 654, 657, 7 L.Ed.2d 614. It is true that in criminal context we deal with the party's Sixth Amendment right to counsel of choice, but if this right may be protected by appeal after final judgment, the addition of this constitutional element makes no difference to our analysis. *See United States v. MacDonald, supra* (Sixth Amendment right to speedy trial adequately protected by appeal after judgment).

Nor do we believe that the reasoning in *Firestone* is any less applicable to a case in which the motion to disqualify has been granted rather than denied. We recognize that some of the circuits and some commentators have argued for a distinction between orders granting and orders denying motions to disqualify. The Second Circuit has argued with respect to orders granting motions to disqualify that

> In such cases, the losing party is immediately separated from counsel of his choice. If the order is erroneous, correcting it by an appeal at the end of the case might well require a party to show that he lost the case because he was improperly forced to change counsel. This would appear to be an almost insurmountable burden. In addition, permitting an immediate appeal from the grant of a disqualification motion does not disrupt the litigation, since the trial must be stayed in any case while new counsel is obtained. Moreover, the grant of a disqualification motion may effectively terminate the litigation if the party whose counsel is disqualified cannot afford to hire new counsel to begin the litigation anew.

Armstrong v. McAlpin, supra, 625 F.2d at 440–41. *See, e.g., In re Continental Investment Corp., supra*, 637 F.2d at 7; *In re Multi-Piece Rim Products Liability, supra*, 612 F.2d at 378, *vacated sub nom Firestone Tire and Rubber Co. v. Risjord*, ____ U.S. ____, 101 S.Ct. 669, 66 L.Ed.2d 571, *supra*; *United States v. Deutsch*, 5 Cir., 1979, 599 F.2d 46, 48; *In re Benjamin*, 1 Cir., 1978, 582 F.2d 121, 124; *In re Investigation Before April 1975 Grand Jury*, D.C. Cir., 1976, 531 F.2d 600, 605 n.8; *Schloetter v. Railoc of Indiana, Inc., supra*, 546 F.2d at 709; *Draganescu v. First National Bank of Hollywood*, 5 Cir., 1974, 502 F.2d 550, 551 n.1.

One commentator has argued that

> Unlike disqualification denials, orders granting disqualification are [not] subject to appellate review after final judgment. If, after the disqualification, the party wins the case, the disqualification becomes moot despite the cost that disqualification imposed on the party. If the party whose attorney is disqualified loses the case, then the error would be viewed as nonprejudicial, except possibly in the most extreme circumstances. This is because, to prove prejudice, it would be necessary to establish that replacement counsel had been so incompetent and unprepared relative to former counsel as to have affected the case. Such a situation is improbable.

Comment, The Appealability of Orderd Denying Motions for Disqualification of Counsel in the Federal Courts, 45 U.Chi.L.Rev. 450, 458 n.39.

We are not convinced by these arguments in the context of a criminal case. We express no opinion on the persuasiveness of these arguments in a civil case, where prejudice is not likely to be presumed. To begin with, the fact that a disqualification order will never be appealed if the defendant triumphs does not trouble us at all. On the contrary, this is an obvious boon

to the system and is just the sort of happy result envisioned by §1291's requirement that appeals not be taken piecemeal. And if the system is benefitted, it is hard to say that the defendant has had to bear any "cost" because of the disqualification. The fact that he won the litigation would indicate that he was not prejudiced by the order, even if it were erroneous.[1]

[2] On the other hand, if the defendant is found guilty and on appeal attacks the order disqualifying his counsel, there is no reason why his right to counsel of choice cannot be vindicated on appeal. We would agree that if the defendant were required to show on appeal that he was convicted because of new counsel, the burden would be insurmountable and the disqualification "effectively unreviewable on appeal." But such a burden need not be imposed. At least in this circuit, if the order can be shown to have been erroneous, prejudice will be presumed. *Slappy v. Morris*, 9 Cir., 1981, 649 F.2d 718, 723 n.4. (No prejudice need be shown where district court violates defendant's Sixth Amendment right to counsel by unreasonably refusing to grant a continuance: "The crux of Slappy's claim is that the court's actions denied him of [sic] his right to counsel.") *Releford v. United States*, 9 Cir., 1961, 288 F.2d 298, 302. ("[W]here there has been complete disregard of the defendant's right to choose his own counsel, prejudice will be assumed.")

Finally, to argue that because the litigation has been once disrupted by disqualification of counsel, it therefore may be twice disrupted by a pre-judgment appeal, is quite uncon-

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[1]We do not consider here whether orders disqualifying government counsel are appealable. In such a case, were the defendant to be found innocent, the government, because of the rule against double jeopardy, would not be able to seek re-trial on the basis that the disqualification order was erroneous.

vincing, particularly in a criminal case where delay can be so damaging. Moreover, because we deal here with a criminal case, if the defendant cannot afford new counsel, the government will provide counsel. Thus, the district judge can see to it that the defendant has the assitance of counsel throughout the proceedings.

In short, we do not deal here with a right such as the right against double jeopardy, which, if it is not vindicated before trial, is irretrievably lost. Greger can obtain review of the disqualification order after trial, and secure a new trial should he persuade the appellate court that the disqualification order is in error. A new trial protects Greger's right to counsel of choice, even if it is a remedy which imposes costs upon the judicial system. Yet in our view and in the opinion of Congress as expressed in §1291, the costs to the system as a whole are far greater where appeals are piecemeal. Of course the expedient of retrial, if it protects the defendant, also subjects him to a second trial. But this is not sufficient reason to permit prejudgment appeal. If it were, a whole host of orders made in the course of a criminal trial would be immediately appealable. *See United States v. Layton*, 9 Cir., 1981, 645 F.2d 681.

II. Mandamus.

[3] If there is a lesson in the shifting history of the appealability of orders *denying* motions to disqualify counsel, it is that the most prudent course is to find such orders unappealable but to retain discretion to permit the really exceptional cases to be heard before final judgment by means of a petition for writ of mandamus. Having found the disqualification order unappealable, we consider whether extraordinary relief is available in this instance under the All Writs Act, 28 U.S.C. §1651.

[4] In *Bauman v. United States District Court*, 9 Cir., 1977, 557 F.2d 650, 654–55, we identified five guidelines to be used in deciding whether the extraordinary relief of a writ of mandamus is appropriate to a particular case:

> (1) The party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief he or she desires . . . (2) The petitioner will be damaged or prejudiced in a way not correctable on appeal . . . (3) The district court's order is clearly erroneous as a matter of law . . . (4) The district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules . . . (5) The district court's order raises new and important problems, or issues of law of first impression. (citations omitted).

It should be clear from our earlier discussion of the appealability of orders granting disqualification that the first two guidelines do not point in favor of extraordinary relief here.

Nor, on the facts of this case, do any of the last three guidelines indicate the suitability of extraordinary relief. Greger has been indicated as part of a continuing government investigation into possible criminal activity in the operation of four Las Vegas casinos owned or operated by the Argent Corporation. Greger was the Food and Beverage Manager of one of these casinos and the government alleged that he used his position to extort bribes and kickbacks from purveyors. Several of the defendants and targets of this investigation, many of whom were associates or superiors of Greger's, have been represented by the same lawyer, Oscar B. Goodman. Greger would now add his name to the list of Argent employees Goodman as represented.

The government has represented to the court that several of Goodman's clients and former clients will be called to testify against Greger and that their testimony "will be directly incriminating" to Greger. The government argues that virtually all of the potential defenses available to Greger will

implicate Goodman's other clients, and that obtaining a favorable plea bargain would require Greger to inform against Goodman's other clients. The government further informed the court that it had attempted to secure Goodman's voluntary withdrawal by making available to the defense its evidence against Greger but that this offer, like all of its efforts to initiate plea bargain negotiations, had been rebuffed.

At a hearing on the disqualification motion Greger and Goodman asserted that there was no conflict of interest and that therefore Greger would not and need not waive his right to conflict-free representation, and that Goodman's present and former clients, if called to testify, would not and need not be asked to waive their attorney-client privileges. Goodman explained that he had not accepted the government's invitation to examine its evidence against Greger because by doing so "he might encroach on another client's rights to effective assistance of counsel." The district judge questioned both Greger and Goodman closely. The court concluded that "conflicts of interest reasonably may be expected to arise" and ordered Goodman disqualified.

Without deciding whether or not the disqualification order was proper, we do note that on these facts, and in the absence of waivers from Greger or from Goodman's other clients, the order appears to be consistent with the law in this circuit, *see United States v. Morando*, 9 Cir., 1980, 628 F.2d 535 (in absence of waiver of attorney-client privilege attorney's representation of defendant and witness required district judge to accept attorney's motion to withdraw or take steps to insure there was no conflict); *Willis v. United States*, 9 Cir., 1979, 614 F.2d 1200 ("[W]e agree that it is good practice for a trial judge to make inquiry when the possibility of a conflict of interest seems apparent" *id.* at 1206; "[*Kaplan v. United States*, 9 Cir., 1967, 375 F.2d 895] . . . lends support to the

generally accepted proposition that when the trial court determined or is advised that the possibility of a conflict is more than remote, but is real and present, it should not allow joint representation without obtaining a knowing waiver from the defendant." *Id.* at 1206 n.4); *United States v. Partin*, 9 Cir., 1979, 601 F.2d 1000, 1006 (defendant waived his right to conflict-free representation, witness waived his attorney-client privilege); *United States v. Vargas Martinez*, 9 Cir., 1978, 569 F.2d 1102, 1104 (fact that prosecution witness was client of defense counsel and that witness did not waive her attorney-client privilege "presented the *possibility* of disclosure of confidential communications" and disqualification order was correct (emphasis added)). *Cf. Chugach Electric Association v. U.S.D.C. for the Dist. of Alaska, supra*, 370 F.2d at 443–444 (in civil suit, although actual conflict of interest is not established, likelihood that attorney will use knowledge gained from former client, now adversary, requires disqualification).

Finally, in light of the decisions cited above, we do not find that the order here "raises new and important problems, or issues of law of first impression." *Cf.* Wright, Law of Federal Courts, (3d ed. 1976 at 509) ("Thus, the cases that hold appeal wll lie from an order granting or denying a motion to disqualify opposing counsel threaten to invite a large number of similar appeals rather than to settle a general question.")

Thus glancing at but not deciding the merits, we do not find that the district court's order qualifies under the guidelines for extraordinary relief. *See Firestone Tire & Rubber Co. v. Risjord, supra*, footnote 13, *Cf. Unified Sewerage Agency v. Jelco, Inc., supra*. We therefore decline to treat the appeal as a petition for a writ of mandamus.

Appeal dismissed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	)	
	)	No. 80-1818
vs.	)	
VICTOR GREGER,	)	*ORDER*
Defendant-Appellant.	)	

Before: DUNIWAY and NORRIS, Circuit Judges, and HANSON,* District Judge

The panel as constituted in the above case has voted to deny the petition for a rehearing and to reject the suggestion of a rehearing in banc.

The full court has been advised of the suggestion for in banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion of a rehearing in banc is rejected.

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*The Honorable William C. Hanson, Senior United States District Judge for the Northern District of Iowa, sitting by designation.

Opposition

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CLERK

No. 81-1357

In the Supreme Court of the United States

OCTOBER TERM, 1981

VICTOR GREGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a pretrial order disqualifying counsel for the defendant in a criminal case is appealable pursuant to 28 U.S.C. 1291 under the "collateral order" doctrine.

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In the Supreme Court of the United States

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 657 F.2d 1109.

JURISDICTION

The judgment of the court of appeals was entered on October 1, 1981. A petition for rehearing was denied on November 19, 1981 (Pet. App. B). The petition for a writ of certiorari was filed on January 19, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On September 16, 1980, an eight-count indictment was returned in the United States District Court for the District of Nevada charging petitioner with filing false income tax returns, in violation of 26 U.S.C. 7206(1) and (2) (Counts I-III), and with interfering with commerce by extortion, in violation of 18 U.S.C. 1951 (Counts IV-VIII) (E.R. 1-9).[1] Prior to the trial, upon motion of the government, the district court disqualified petitioner's attorney (E.R. 34-37). The court of appeals dismissed the appeal for want of jurisdiction and declined to treat the appeal as a petition for a writ of mandamus (Pet. App. 1a-13a).

1. From 1978 to 1980, the Las Vegas Strike Force conducted an investigation of suspected criminal activities at four Las Vegas gambling casinos that were owned or operated by the Argent Corporation. Following his indictment during the course of this investigation, petitioner retained attorney Oscar Goodman to represent him at trial. Goodman previously had represented the Argent Corporation as well as several individual targets of the Strike Force's investigation, including Allen Glick, the owner and president of Argent Corporation, and Jerome Osgood, an employee at a hotel owned by Argent Corporation (E.R. 13).

Upon learning of Goodman's representation of petitioner, the government advised Goodman's law firm, both orally and by letter, that it believed Goodman's representation of petitioner, who was an officer of Argent Corporation and assistant to Glick, constituted a conflict of interest (E.R. 10-11). Goodman

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[1] "E.R." refers to the Excerpt of Record filed by petitioner with the court of appeals.

declined to withdraw as counsel for petitioner. Thereafter, the government filed a motion requesting the district court to disqualify Goodman. In support of the motion, the government represented that Glick and Osgood, as well as other Argent employees, would testify for the government at petitioner's trial and that their testimony, if truthful, would directly incriminate petitioner (E.R. 12, 14).

The district court conducted a lengthy hearing on the disqualification motion (Tr. 4-66).[2] At the hearing, Goodman represented to the court (Tr. 24-25) that when petitioner retained him as counsel, he had advised petitioner of a possible conflict of interest due to his prior representation of other individuals who might also be targets of the Strike Force investigation. Goodman stated (*ibid.*) that he had explained to petitioner that the government might wish to enter into a plea agreement with him, under the terms of which petitioner would be required to testify for the government against other clients of Goodman, and that such a turn of events would present Goodman with a conflict of interests. Goodman stated that petitioner had told him that he was not interested in entering into a plea agreement with the government because he was not guilty of the charges against him (Tr. 25-26). Goodman further stated to the court (Tr. 27-33) that based on the indictment, the information disclosed to him by petitioner, and his initial trial preparations, he had decided that his prior representation of Glick and Osgood did not create an actual conflict of interest with respect to his representation of petitioner.[3]

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[2] "Tr." refers to the November 21, 1980, hearing on the government's motion to disqualify Goodman.

[3] In particular, Goodman stated (Tr. 27-29) that in his view neither Glick nor Osgood would incriminate petitioner

Goodman admitted, however, that his trial preparation to date had been only "cursory" and "not in depth" and that he had declined the government's offer of discovery; for these reasons, he acknowledged that he did not know the nature of the government's proof against petitioner (Tr. 27). He further admitted (Tr. 28-29, 33-34, 36-37) that if the government's discovery material contained incriminating admissions made by petitioner to either Osgood or Glick, then his obligation to impeach his former clients on cross-examination might create a conflict of interest. When the court asked Goodman whether Osgood and Glick would waive their attorney-client privileges for purposes of cross-examination at petitioner's trial, Goodman replied that he would not ask them to do so. Goodman added, however, that he knew of no confidences received from his former clients that related to petitioner (Tr. 37).

The court then questioned petitioner to determine whether he appreciated the risks inherent in a conflict of interest situation (Tr. 40-54). Petitioner stated that he had discussed the problem with Goodman, but that he felt Goodman's representation of him did not constitute a conflict of interest (Tr. 41). However, when asked by the court to define a conflict of interest and describe in general terms how a conflict might arise when one attorney represents both a defendant and the witnesses against him, petitioner was unable to do so satisfactorily (Tr. 41-46). The court then asked petitioner whether he was willing to waive his right to the effective representation of counsel, or whether, if a conflict of interest developed, he would want to obtain new counsel (Tr. 48).

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at trial and that nothing he had learned from his two former clients conflicted with anything petitioner had told him.

Petitioner somewhat ambiguously replied that "if there was a limitation in [Goodman's] defending me I would not have him" (Tr. 49). The court then asked petitioner whether he had discussed with Goodman and whether he understood that an available defense to the charges might be that he was acting under the order of his superiors in the Argent Corporation (Tr. 51, 53-54). Goodman advised petitioner not to answer either question (*ibid.*).

The court thereafter asked petitioner whether he understood that if he was convicted he could not claim on appeal that he had been denied the right to the effective representation of counsel (Tr. 54). Although petitioner stated that he understood (*ibid.*), Goodman informed the judge that he did not want petitioner to waive his right to effective representation. Rather, Goodman said that he would withdraw as counsel for petitioner if the government could disclose to him those areas where a present conflict existed, or if the court, after an *in camera* inspection of Jencks Act material, could determine that such a conflict existed (Tr. 55-56, 61-62).

2. The district court granted the government's motion to disqualify Goodman (E.R. 34-37). Based on the government's representations that petitioner would be incriminated by Goodman's former clients (E.R. 34), the court found that a conflict of interest reasonably might be expected to arise if Goodman continued to represent petitioner. The court further found that petitioner had not waived his Sixth Amendment right to conflict-free representation; that even if petitioner had sought to waive that right, the validity of any such waiver would be questionable because Goodman had rejected the government's discovery offer and thus did not know the nature of the

evidence against petitioner; and that the government witnesses whose previous representation by Goodman gave rise to the conflict of interest situation likewise had not waived their attorney-client privileges (E.R. 36).

3. Petitioner appealed the district court's disqualification order, but the court of appeals dismissed the appeal for lack of jurisdiction (Pet. App. 2a-10a, 13a). The court held that a pre-trial order in a criminal case disqualifying defense counsel is not appealable under 28 U.S.C. 1291 because it does not fall within the "collateral order" exception to the final judgment rule articulated by this Court in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). Relying on *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368 (1981), the court found that, like an order denying a motion to disqualify the opposing party's counsel in a civil case, an order disqualifying defense counsel in a criminal case is effectively reviewable on appeal from a final judgment. Thus, the court reasoned, if petitioner subseqently were convicted of the charges against him, he could secure a new trial if he established on appeal that the district court erred in disqualifying his attorney. Accordingly, petitioner's asserted right to counsel of his choice was not a right that would be irretrievably lost if not vindicated before trial (Pet. App. 6a-7a, 9a). The court also declined to assume jurisdiction over the case by treating petitioner's appeal as a petition for a writ of mandamus, finding that on the facts of this case, the extraordinary relief of mandamus was not appropriate (Pet. App. 10a-13a).

Petitioner's petition for rehearing and suggestion for rehearing en banc were denied on November 19, 1981, and the court of appeals' mandate issued on December 2, 1981. Petitioner's motion for a stay of

the trial pending certiorari was denied by the district court on January 8, 1982. On March 8, 1982, petitioner, through Goodman, filed a motion in the court of appeals to recall the mandate and to stay proceedings in district court pending certiorari. That motion was denied by the court of appeals on March 25, 1982.[4] We have been informed by the Strike Force Office in Nevada that on March 8, 1982—the same date on which Goodman filed the motion for a stay in the court of appeals—the Federal Public Defender was appointed to represent petitioner. Trial is now scheduled for June 8, 1982.

ARGUMENT

The principal issue presented in the certiorari petition (Pet. 3-10) is whether the court of appeals had jurisdiction under 28 U.S.C. 1291 of petitioner's appeal of the district court's pretrial order granting the government's motion to disqualify his attorney. This issue is one of substantial importance in the administration of criminal justice that may well warrant review by this Court in an appropriate case, especially because the rule in the Ninth Circuit on the question is in conflict with that in a number of other circuits. Nevertheless, we believe that the Court should deny the petition for a writ of certiorari in this case.[5]

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[4] Petitioner, through Goodman, previously had filed an application in this Court on February 17, 1982, for a stay of district court proceedings pending certiorari, but that application was returned to counsel on February 19, 1982, because he had not first sought a stay in the court of appeals.

[5] We note preliminarily that this case is criminal in nature, at least insofar as it concerns the question of the court of appeals' jurisdiction of the pretrial appeal under 28 U.S.C.

1. Petitioner's trial has not been stayed by the courts below or by this Court pending the disposition of his petition for a writ of certiorari, and that trial, with new counsel, is now scheduled for June 8, 1982. If petitioner is acquitted, the issue of the disqualification of Goodman will be effectively mooted; if petitioner is convicted, the court of appeals made clear (Pet. App. 9a) that the disqualification order could be reviewed on appeal from the judgment of conviction. In these circumstances, review by this Court is not warranted.

Nor would it be sound to continue the trial in this case for the period necessary for plenary review by this Court (and further proceedings in the court of appeals if the Court were to find the disqualification order appealable). The indictment was returned in September 1980, and we have been informed by the Strike Force attorney responsible for the case that most of the evidence—which pertains to incidents as far back as 1974—was presented to the grand jury in 1978. That attorney also has informed us that two of the government's witnesses in the case have died during this period. Moreover, at this juncture, petitioner's new counsel, who was appointed on March 8, 1982, presumably has spent much effort preparing for the impending trial, so that substitution of Goodman could only lead to further delays in a case that has already been delayed nearly a year and a half by these appellate proceedings. But for these factors, we might not object to review by this Court, for the reasons explained below.

1291. The petition was filed on the 61st day following the denial of rehearing by the court of appeals and therefore appears to be out of time under Rule 20.1 of the Rules of this Court.

2. a. In *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368 (1981), a civil case, the Court held that an order *denying* a motion to disqualify opposing counsel is not immediately appealable pursuant to 28 U.S.C. 1291 under the collateral order doctrine. The Court assumed without deciding that such an order concerns an issue completely separate from the merits of the case (449 U.S. at 375-376), but it held that the order is not "effectively unreviewable on appeal from a final judgment" and therefore fails to satisfy the third prong of the three-part test of appealability established by this Court's decisions (*id.* at 376-378).[6] The Court reasoned that the propriety of the district court's denial of disqualification often will be difficult to assess until its impact on the underlying litigation may be evaluated. The Court further reasoned that there would be a meaningful opportunity for review of the order on an appeal from a final judgment because, if the court of appeals should conclude that there was prejudicial error, it could exercise its usual authority to vacate the judgment appealed from and order a new trial.

In holding an order denying disqualification not to be appealable, the Court in *Firestone* expressly reserved the questions whether an order *granting* disqualification is immediately appealable under the collateral order doctrine and whether different considerations might be present in a criminal case (*id.* at 372 n.8). The court of appeals, however, found this

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[6] " '[T]he order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment' " (449 U.S. at 375, quoting *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978) (footnote omitted)).

Court's reasoning in *Firestone* equally applicable to the order granting disqualification in the instant case. The court concluded that petitioner would have a plainly adequate opportunity for review of the disqualification order, and other claims of error, at the conclusion of his trial if he is convicted (Pet. App. 6a-9a). The court stressed in this regard that petitioner would not be required to demonstrate that he was convicted as a result of the substitution of counsel because, in the Ninth Circuit, if a disqualification order can be shown to have been erroneous, prejudice will be presumed (Pet. App. 9a, citing *Slappy* v. *Morris*, 649 F.2d 718, 723 n.4 (9th Cir. 1981), cert. granted, No. 81-1095 (Mar. 29, 1982)). Moreover, the court of appeals observed that "[a]dherence to [the] rule of finality has been particularly stringent in criminal prosecutions because 'the delays and disruptions attendant upon intermediate appeal,' which the rule is designed to avoid, 'are especially inimical to the effective and fair administration of the criminal law'" (Pet. App. 6a-7a, quoting *Abney* v. *United States*, 431 U.S. 651, 657 (1977), and *DiBella* v. *United States*, 369 U.S. 121, 126 (1962)).

b. Although we do not subscribe to all of the Ninth Circuit's reasoning (see page 14, note 8, *infra*), we find considerable merit in its holding that an order granting a pretrial motion to disqualify counsel is not a collateral order immediately appealable pursuant to 28 U.S.C. 1291. If the party whose counsel is disqualified prevails, the disqualification issue will have been mooted. And if that party loses, he may challenge the disqualification order on appeal from a final judgment; at that time, the court of appeals will have a more complete record on which to evaluate the disqualification issue than would have

been available if the issue were reviewed prior to trial.

Attorney disqualification issues often must be resolved prior to trial on the basis of the potential for a conflict of interest to emerge at a later stage. See, *e.g.*, *Firestone*, *supra*, 449 U.S. at 376-377; *id.* at 381 (Rehnquist, J., concurring in the result); *Cuyler* v. *Sullivan*, 446 U.S. 335, 346-348 (1980); cf. *Holloway* v. *Arkansas*, 435 U.S. 475, 484-485 (1978). Until the trial (or some other event, such as plea bargaining) unfolds, it cannot be known with certainty whether an *actual* conflict affecting counsel's performance will materialize. If the circumstances giving rise to the asserted conflict of interest on which the disqualification order was based in fact materialize at trial, the party whose lawyer was disqualified would not be in a position to complain on a subsequent appeal from an adverse final judgment, even if the order arguably was erroneous when made at the pretrial stage. Also, a review of the entire record after trial would better enable the appellate court to determine the magnitude of the error, if any, and the extent to which it might have prejudiced the party's rights. Finally, we note that even if the court of appeals were to reverse a pretrial disqualification order on the ground that the necessary factual basis had not yet been established when the order was rendered, subsequent developments could lead the trial court to enter a second order of disqualification, which could give rise to a second pretrial appeal. By the same token, as in three recent cases finding disqualification orders immediately appealable, the court of appeals might remand for further proceedings on the disqualification issue, which likewise could result in a second pretrial appeal. See, *e.g.*, *United States*

v. *Cunningham*, Nos. 690 and 701 (2d Cir. Feb. 18, 1982), slip op. 1354; *United States* v. *Shepard*, No. 82-1005 (8th Cir. Apr. 9, 1982), slip op. 5-6; *United States* v. *Agosto*, Nos. 82-1057, 82-1058, and 82-1059 (8th Cir. Apr. 9, 1982), slip op. 15-16, 17, 21-22. The potential for delay and abuse in such procedures is obvious. For all of these reasons, we believe there is much to be said for postponing any appellate consideration of a disqualification order to an appeal from a final judgment.

We note, however, that since this Court's decision in *Firestone*, a number of courts of appeals have held, in both civil and criminal cases, that orders granting disqualification orders are immediately appealable under the collateral order doctrine. See *United States* v. *Agosto, supra*, slip op. 2-3 n.1; *United States* v. *Hobson*, No. 82-5138 (11th Cir. Mar. 24, 1982), slip op. 802; *United States* v. *Cunningham, supra*, slip op. 1334 n.1; *Cossette* v. *Country Style Donuts, Inc.*, 647 F.2d 526, 528 n.2 (5th Cir. 1981); *Duncan* v. *Merrill Lynch, Pierce, Fenner & Smith*, 646 F.2d 1020, 1024-1025 (5th Cir. 1981), cert. denied, No. 81-252 (Oct. 13, 1981); see also *United States* v. *Smith*, 653 F.2d 126 (4th Cir. 1981) (entertaining a pretrial appeal; issue of appealability not addressed). Indeed, another panel of the Ninth Circuit held that an order granting a motion for disqualification *is* immediately appealable in a civil case. *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 658 F.2d 1355, 1356-1358 (1981), cert. denied, No. 81-1286 (Mar. 1, 1982). In its opinion in the latter case, as amended on petition for rehearing, the panel distinguished the panel's decision in the instant case on the ground that this is a criminal case, in which the policy against piecemeal appeals is espe-

cially strong. 658 F.2d at 1358. In addition, the panel noted, as did the panel below, that prejudice would be presumed to result from erroneous disqualification in a criminal case, thereby rendering review on appeal from a final judgment of conviction fully adequate; in civil cases, in contrast, reversal of a final judgment would result only in the unlikely event that the substitution of counsel actually affected the result in the case. For this reason, the panel concluded that the disqualification order would be effectively unreviewable on an appeal from a final judgment. *Ibid.*, citing *Duncan* v. *Merrill Lynch, Pierce, Fenner & Smith*, *supra*, 646 F.2d at 1027.

Even as limited to criminal cases, however, the holding below conflicts with decisions of the Second, Eighth, and Eleventh Circuits, rendered after this Court's decision in *Firestone*, holding disqualification orders in criminal cases to be immediately appealable. See *United States* v. *Cunningham*, *United States* v. *Agosto*, and *United States* v. *Hobson*, *supra*.[7] However, the premise of the Ninth Circuit's conclusion that criminal cases are distinguishable from civil cases for purposes of the appealability of pretrial orders disqualifying counsel—*i.e.*, that prejudice will be presumed to result from an erroneous order disqualifying counsel and that automatic reversal therefore

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[7] In *United States* v. *Smith*, *supra*, which was also a criminal case, the Fourth Circuit did not advert to the question of appealability. Compare *United States* v. *Caggiano*, 660 F.2d 184, 189-190 (6th Cir. 1981), holding an order disqualifying the United States Attorney's Office immediately appealable by the government under 28 U.S.C. 1291. We note in this regard that the government would have no right of appeal from a judgment of acquittal and that the disqualification order at issue in *Caggiano* therefore would not have been "effectively reviewable" on a later appeal.

would result in such circumstances on appeal from a final judgment of conviction—will be considered by this Court on writ of certiorari to review the Ninth Circuit's previous decision in *Slappy* v. *Morris*, *supra*, the very decision upon which the panels in the instant case and in *In re Coordinated Pretrial Proceedings*, *supra*, relied. See 81-1095 Petition for Cert., at 17-21. If this Court affirms the Ninth Circuit's decision in *Slappy* v. *Morris* on this point, the Ninth Circuit's reasoning that fully adequate review of a disqualification order is available on appeal from a final judgment of conviction and that an immediate appeal therefore is not aavilable from such an order seems irrefutable. And even if the Court reverses the Ninth Circuit in *Slappy* v. *Morris*, the Court's consideration in that case of the weight to be given a defendant's preference for a particular attorney [8] might shed some

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[8] We have substantial doubts that reversal of a conviction should automatically follow if a court of appeals, on appeal from a final judgment of conviction, disagrees with the district court's decision to order the disqualification of counsel. The trial court necessarily is vested with broad discretion in controlling both the course of proceedings before it and the conduct of attorneys in those proceedings (cf. *Geders* v. *United States*, 425 U.S. 80, 86-88 (1976); *United States* v. *Dinitz*, 424 U.S. 600, 611 (1976)), and it reasonably can be argued that the court's actions to this end should not result in reversal of a conviction absent a showing of prejudice or, at least, an abuse of the district court's discretion. This may be true even if it is ultimately determined that the disqualification order violated the defendant's Sixth Amendment rights. See *United States* v. *Morrison*, 449 U.S. 361 (1981).

We may assume for present purposes that the Sixth Amendment affords protection to a defendant's choice of particular counsel from arbitrary interference that is greater than whatever protection the Due Process Clause or general non-constitutional principles of federal law afford a litigant's choice of counsel in a civil case. That choice is nevertheless

light on the appropriateness of an immediate appeal from a pretrial order disqualifying that attorney. The pendency of *Slappy* v. *Morris*, raising a related issue, weighs against granting certiorari on the appealability issue here, at least when coupled with the appointment of new counsel in this case since the certiorari petition was filed and the scheduling of trial for June 8.[9]

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subject to ethical rules governing the legal profession and the court's power to apply those rules in the same manner in which it applies other rules in proceedings before it. Because of the broad discretion that we believe must be vested in the district courts over such matters, we do not believe that the immediate appealability of an order disqualifying counsel in a criminal case is necessarily dependent upon whether reversal would automatically result on appeal from a final judgment if the district court were found to have erred.

[9] Petitioner also claims (Pet. 10-13) that the court of appeals should have assumed jurisdiction over the instant case by treating his appeal as a petition for a writ of mandamus. However, given the government's representation that former clients of Goodman would testify against petitioner at trial, and the absence of waivers either by the witnesses of their attorney-client privilege, or by petitioner of his right to conflict-free representation, the district court's disqualification of Goodman was entirely proper. See, *e.g.*, *Willis* v. *United States*, 614 F.2d 1200, 1206 n.4 (9th Cir. 1979); *United States* v. *Alvarez*, 580 F.2d 1251, 1259-1260 (5th Cir. 1978); *United States* v. *Dolan*, 570 F.2d 1177, 1181-1184 (3d Cir. 1978); *United States* v. *Vargas-Martinez*, 569 F.2d 1102, 1104 (9th Cir. 1978); *United States* v. *Bernstein*, 533 F.2d 775, 787-788 (2d Cir.), cert. denied, 429 U.S. 998 (1976). Because the courts have consistently held that disqualification is proper in circumstances such as these, review of petitioner's claim by way of mandamus clearly was not warranted. See, *e.g.*, *Bauman* v. *United States District Court*, 557 F.2d 650, 654-655 (9th Cir. 1977). Further review of this claim is not necessary.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

VICTOR GREGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

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SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

The principal issue presented in the petition for certiorari is whether a pretrial order disqualifying counsel for the defendant in a criminal case is appealable pursuant to 28 U.S.C. 1291 under the "collateral order" doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), and its progeny. The district court in this case granted the government's motion to disqualify petitioner's attorney, Oscar Goodman, and petitioner appealed the disqualification order prior to trial. The court of appeals held that it did not have jurisdiction of petitioner's appeal under 28 U.S.C. 1291 and dismissed the appeal (Pet. App. 2a-10a).

As we pointed out in our brief in opposition (at 8), petitioner's trial was not stayed pending the disposition of the petition for a writ of certiorari. That trial, at which petitioner was represented by new counsel (the Federal Public Defender), has now been concluded. Petitioner was convicted on three counts of filing false income tax returns, in violation of 26 U.S.C. 7206, and five counts of interfering with commerce by means of extortion, in violation of 18 U.S.C. 1951. He was sentenced on September 7, 1982, to concurrent terms of 18 months and a $3,000 fine on each of the income tax counts and concurrent terms of four years and a $4,000 fine on each of the Hobbs Act counts, with the 18-month and 4-year terms of imprisonment to run consecutively. Petitioner filed a notice of appeal from his judgment of conviction on September 14, 1982.

Petitioner's conviction and pending appeal of that conviction would appear to have rendered moot the question presented in the instant certiorari petition of whether the court of appeals correctly dismissed petitioner's pretrial appeal challenging the district court's disqualification order. Cf. *Murphy* v. *Hunt*, No. 80-2165 (Mar. 2, 1982).[1] Moreover, in dismissing petitioner's pretrial appeal, the court of appeals made clear that petitioner could raise his objection to the district court's disqualification order on an appeal from a final judgment of conviction (Pet. App.

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[1]The question whether the court of appeals correctly declined to grant mandamus relief to compel the district court to permit petitioner to be represented by attorney Goodman (Pet. App. 10a-13a)—the other issue presented in the certiorari petition (Pet. 10-13)—likewise has been rendered moot by subsequent events.

8a-10a).[2] Although petitioner has not yet filed a brief identifying the issues to be raised in the court of appeals, he is free under the court's prior opinion to raise the disqualification issue should he choose to do so. Accordingly, if the Court denies certiorari here, petitioner will not be deprived of an adequate opportunity to present to the court of appeals his argument that his Sixth Amendment rights were violated by the disqualification of Goodman.

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[2]In concluding that petitioner's claim would be effectively reviewable on appeal from a final judgment, and therefore was not appealable prior to trial under the collateral order doctrine (see, *e.g.*, *Nixon* v. *Fitzgerald*, No. 79-1738 (June 24, 1982), slip op. 9), the court of appeals relied in large part on its view that if petitioner showed on appeal from a final judgment that the district court erred in disqualifying Goodman, prejudice would be presumed and reversal of the conviction would follow automatically (Pet. App. 9a, citing *Slappy* v. *Morris*, 649 F. 2d 718, 723 n.4 (9th Cir. 1981), cert. granted, No. 81-1095 (Mar. 29, 1982)). As we explain in our brief in opposition (at 14-15 n.8) and in the Brief for the United States as Amicus Curiae (at 26-27 n.10) in *Morris* v. *Slappy*, No. 81-1095, 1981 Term, we do not believe that whether a disqualification order in a criminal case is immediately appealable under 28 U.S.C. 1291 should depend on whether reversal would follow as a matter of course if it were shown on appeal from a final judgment of conviction that the disqualification order was erroneous. As we further explain in our brief in opposition in this case (at 14 n.8) and our amicus brief in *Morris* v. *Slappy* (at 18-23, 25-28), the appellant at least must demonstrate that the action of the trial court that had the effect of depriving him of the assistance of counsel of his choice was arbitrary or an abuse of discretion, and he should be required to make some showing of an adverse impact on his case as well. This Court's decision in *Morris* v. *Slappy* may shed some light on these issues. We are furnishing petitioner, through Mr. Goodman, his counsel of record on the instant petition for certiorari, with a copy of our amicus brief in *Morris* v. *Slappy*.

In view of petitioner's conviction and appeal, and for the additional reasons set forth in our brief in opposition (at 14-15), it is respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General

SEPTEMBER 1982

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